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U.S. COURTS

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RECUPEROS, LLC, an Idaho limited liability
company,

Plaintiff,

vs.

AMERICAN FOOD STORES, LLC, a
California limited liability company,

Defendant.

AMERICAN FOOD STORES, LLC, a
California limited liability company,

Counterclaimant,

vs.

RECUPEROS, LLC, an Idaho limited liability
company,

Counterdefendant.

Civil No. 04-229-S-BLW

**PLAINTIFF'S STATEMENT OF
UNDISPUTED FACTS IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY
JUDGMENT RE: SPECIFIC
PERFORMANCE**

COMES NOW the plaintiff/counterdefendant, Recuperos, LLC, and pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7.1(b)(1), hereby submits this statement of undisputed facts in support of its motion for partial summary judgment.

1. On or about November 12, 2003, the plaintiff and defendant entered into an Asset Purchase Agreement (the "Purchase Agreement"), pursuant to the terms of which defendant agreed to purchase a number of Colorado convenience store properties from the plaintiff (the "Subject Properties") in consideration for a purchase price of \$10,000,000.00. See Exhibit A to Second Affidavit of Brian Naeve (the "Second Naeve Affidavit"), as filed concurrently herewith. The Purchase Agreement was never amended, modified or assigned from its effective date to its termination. Second Naeve Affidavit, p. 2, ¶ 4. The Purchase Agreement required that defendant remit an earnest money deposit in the aggregate amount of \$1,000,000.00 (the "Earnest Money") within 30 days of the effective date of the Purchase Agreement. *Id.*, Exhibit A, p. 16, § 9. The defendant paid \$306,155.15 of such amount (the "Deposit"), of which \$10,000.00 was remitted directly to the plaintiff and \$296,155.15 was held in escrow, pursuant to the terms of the Purchase Agreement. See Verified Complaint (Dkt. No. 1), dated May 12, 2004 (the "Complaint"), pp. 2-3, ¶ 10. The plaintiff complied with the terms of the Purchase Agreement and performed fully its obligations thereunder. Second Naeve Affidavit, p. 2, ¶ 5. The defendant breached the terms of the Purchase Agreement by, *inter alia*, refusing to remit the balance of the Earnest Money. *Id.*, p. 2, ¶ 6. The defendant has never tendered the balance of the Earnest Money. *Id.*, p. 2, ¶ 7. The plaintiff terminated the Purchase Agreement through written notice on or about January 16, 2004. See Second Naeve Affidavit, Exhibit B. Pursuant to the terms of the Purchase Agreement, upon defendant's breach thereof, the plaintiff was entitled to retain the Deposit as liquidated damages. In accordance with the terms of the

Purchase Agreement, and with defendant's express consent, \$296,155.15 of the Deposit was released from escrow to plaintiff on or about January 19, 2004. The plaintiff also retained the \$10,000.00 portion of the Deposit held directly by plaintiff. Complaint, ¶¶ 8-12.

2. Thereafter, the defendant claimed that the Deposit had been improperly retained and demanded return of the Deposit, which demand plaintiff rightfully refused. *Id.*, ¶ 14. On or about January 28, 2004, the plaintiff and defendant entered into a Mutual Settlement and Release Agreement (the "Settlement Agreement") which provided, *inter alia*, that the plaintiff was entitled to retain the Deposit and that the defendant thereby relinquished all claim thereto. *See* Exhibit A to Affidavit of Jason G. Murray ("Murray Affidavit") (Dkt. No. 11), as previously filed. The Settlement Agreement provided that the defendant release all claims against plaintiff which related in any manner to the Purchase Agreement or the Deposit. Complaint, ¶¶ 13-16. The defendant was represented by counsel throughout the negotiation of the Purchase Agreement and the Settlement Agreement. Second Nacvc Affidavit, p. 3, ¶ 9.

3. Notwithstanding the express terms of the Settlement Agreement, on or about May 5, 2004, the defendant made written demand upon plaintiff for return of the Deposit. *See* Murray Affidavit, Exhibit B. Such demand sets forth no cognizable factual or legal basis for the defendant's claim to the Deposit. *Id.*, ¶ 17. On or about May 12, 2004, plaintiff filed the pending action for declaratory relief asking this Court to enforce the Settlement Agreement.

4. Subsequent to the defendant's failure to close its purchase of the Subject Properties, and after execution of the Settlement Agreement, the plaintiff again marketed the Subject Properties in an attempt to secure a buyer. On or about March 24, 2004, the plaintiff entered into a new agreement with a new buyer to sell the Subject Properties. *See* Affidavit of Brian Naeve (the "First Nacvc Affidavit") (Dkt. No. 10), ¶ 5, as previously filed. The new buyer

was Super America, LLC ("SAL"). The plaintiff and SAL moved toward closing under the terms of their agreement, and the defendant attempted to thwart the transaction. On the morning of June 16, 2004, the plaintiff received, via facsimile, copies of 11 lis pendens relating to each of the Subject Properties, which lis pendens were executed by the defendant. See First Naeve Affidavit, ¶ 6 and Exhibit A. The next day, June 17, the plaintiff received confirmation that at least four of the lis pendens had been recorded in the county in which some of the Subject Properties were located. First Naeve Affidavit, ¶ 7 and Exhibit B.

5. Upon receipt of the four recorded lis pendens by facsimile, counsel for the plaintiff contacted each of the two attorneys that had purported to represent the defendant in this matter. Murray Affidavit, ¶ 6. Plaintiff's counsel set forth the reasons that the lis pendens were abusive and contrary to law, but each such defense counsel disavowed any participation in the execution of the documents. *Id.*, ¶ 6. Mr. Curtis, however, did suggest that plaintiff's counsel contact an attorney in Denver regarding the lis pendens, which plaintiff's counsel did. *Id.*, ¶ 7. Such Colorado counsel admitted knowledge of the lis pendens, but denied any participation in their production or recordation. *Id.*, ¶ 7. Plaintiff's counsel then sent a letter, dated June 17, 2004, to each of defendant's counsel, demanding that the lis pendens be removed. Murray Affidavit, Exhibit C. The defendant, however, refused to heed such demand.

6. Despite the defendant's efforts to scuttle the SAL transaction, the plaintiff was able to hold the agreement together and SAL eventually purchased all of the Subject Properties. Second Naeve Affidavit, p. 3, ¶ 10. In order to close the transaction, however, the plaintiff was forced to make certain concessions and additional promises to SAL, due to the existence of the defendant's claims. *Id.*, p. 3, ¶ 11. Most importantly, the plaintiff was compelled to agree to remove or cause the title company to insure over the lis pendens on the


Subject Properties, to indemnify SAL for any losses which it suffers as a result of the failure to remove or cause the title company to insure over the lis pendens, and to escrow \$550,000 of the SAL sales proceeds to guarantee such performance by the plaintiff. *Id.*

7. On or about June 18, 2004, the plaintiff filed its Motion for Preliminary Injunction and Expungement of Lis Pendens (Dkt. No. 8) and the Court held a telephonic hearing on the plaintiff's motion on June 25, 2004. Although the Court found that the defendant had improperly recorded the lis pendens, due to the fact that there was no action pending which affected the title to real property, the Court concluded that it had no authority to order their removal. *See* Memorandum Decision and Order, dated July 2, 2004 (Dkt. No. 20). Thereafter, the plaintiff obtained the issuance of an Order to Show Cause from a Colorado state court in order to attempt to remove the lis pendens. Second Naeve Affidavit, p. 3, ¶ 12. After a hearing on August 3, 2004, the Colorado court found that the defendant breached the Purchase Agreement, that no grounds existed for the lis pendens and therefore ordered the lis pendens to be removed. *See* Order and Decree of District Court, County of Weld, State of Colorado, Case No. 2004CV1298, attached as Exhibit C to Second Naeve Affidavit. Less than one hour after the Colorado court's ruling, which was delivered from the bench, the defendant re-recorded the four Weld County lis pendens. *See* Exhibits D-G to Second Naeve Affidavit.

8. Subsequent to this Court's ruling on the plaintiff's motion for injunctive relief, the defendant filed its Answer to Verified Complaint, Counterclaim and Demand for Jury Trial (the "Answer and Counterclaim") (Dkt. No. 21) on or about July 9, 2004. The defendant's request for specific performance, set forth in paragraph 3 of the Answer and Counterclaim's prayer, is the subject of the plaintiff's motion for partial summary judgment.

DATED this 11 day of August, 2004.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Michael O. Roe – Of the Firm
Attorneys for Plaintiff/Counterdefendant
Recuperos, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11 day of August, 2004, I caused a true and correct copy of the foregoing **PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT RE: SPECIFIC PERFORMANCE** to be served by the method indicated below, and addressed to the following:

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